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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 344

BARBARA F. EVANS, Personal Representative
of the Estate of Roy Evans, Deceased, - Petitioner,

versus

GENERAL MOTORS CORPORATION, - Respondent.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA,
EVANSVILLE DIVISION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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702 Court Building,
Evansville, Indiana,
Attorney for Petitioner.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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PAGE

INDEX.

	PAGE
Citations to Opinion Below	1
Jurisdiction	2
Questions Presented	2- 3
Statement of the Case	3-12
Reasons for Granting the Writ	13-31
Conclusion	33
Appendix A—Opinion	35-45

LIST OF AUTHORITIES CITED.

Cases.

	PAGE
Belt, etc. Co. v. McClain, 58 Ind. App. 171, 176, 106 N. E. 742	20
Bradford v. Chism, 1963, 134 Ind. App. 501, 186 N. E. 2d 432	17
Coca-Cola Bottling Works of Evansville v. Williams, 1941, 111 Ind. App. 574, 37 N. E. 702	23
Coleman v. Mitnick, 1964, ____ Ind. App. ____, 202 N. E. 2d 577, 578	17
Conley v. Gibson, 1957, 355 U. S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80	16, 31
Dagley v. Armstrong Tire and Rubber Co., et al., CCA 7th, 1965, 344 F. 2d 254	24, 28
Davlin v. Henry Ford & Son, Inc., CCA 6th, 1927, 20 F. 2d 317, 319	26
Elliott v. General Motors Corp., CCA 7th, 1961, 296 F. 2d 125	23
Erie R. Co. v. Thompkins, 1938, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188	17
Estes v. Anderson Oil Company, 1931, 93 Ind. App. 365, 176 N. E. 560	17
Evans v. General Motors Corp.,359 F. 2d 822 (West's Advance Sheets)	1
Garr v. Blissmer, et al., 1961, 132 Ind. App. 635, 177 N. E. 2d 913	17
Greeno v. Clark Equipment Co., DC Ind., 1965, 237 F. Supp. 427	28
Halpern v. J. A. D. Construction Corp., 1960, 27 Misc. 675, 202 N. Y. S. 2d 945	27
Hamilton, Ex'r. v. Feary, 1893, 8 Ind. App. 615, 35 N. E. 48, 52 Am. St. Rev. 485	24
Hardman v. Helene Curtis Industries, Inc., 1964, 48 Ill. App. 2d 42, 63, 198 N. E. 2d 681, 691	27

PAGE

Holland Furnace Co. v. Nauracaj, 1938, 105 Ind. App. 574, 14 N. E. 2d 339 23

J. I. Case Company v. Sandefur, 1964, ____ Ind. ____, 193 N. E. 2d 647, 197 N. E. 2d 519 23

Kahn v. Chrysler Corporation, DC Tex., 1963, 221 F. Supp. 677, 679 27

King's Indiana Billiard Co. v. Winters, 1952, 123 Ind. App. 110, 119; 106 N. E. 2d 713 26

MacPherson v. Buick Motors Co., 1916, 217 N. Y. 382, 111 N. E. 1050 ..... 23, 24, 32

McCloud v. Leavitt Corporation, D. C. Ill., 1948, 79 F. Supp. 386, 291 ..... 16, 23

Mandeville Island Farms v. American Crystal Sugar Co., 1948, 334 U. S. 219, 68 Supp. Ct. 996, 92 L. Ed. 1328 28

Meyer v. Greenwood, et al., 1955, 125 Ind. App. 288, 124 N. E. 2d 870, 872 25

Robertson Music House v. Wm. H. Armstrong Co., 1929, 90 Ind. App. 413, 415-416 24

S. I. G & E. Co. v. Caine, 1964, ____ Ind. App. ____, 198 N. E. 2d 14, 18 26

Tabor v. Continental Baking Co., 1941, 110 Ind. App. 633, 38 N. E. 2d 257, 261 26

Union Traction Co. v. Berry, 1919, 188 Ind. 514, 520, 121 N. E. 655, 32 A. L. R. 1171 18

U. S. v. Shubert, 1955, 348 U. S. 222, 75 Supp. Ct. 277, 99 L. Ed. 279 28

Wojciuk v. U. S. Rubber Co., 1961, 13 Wis. 2d 173, 108 N. W. 2d 149 23

Constitution, Statutes and Rules,

14th Amendment to U. S. Constitution 16

Indiana Bill of Rights, Article 1, Section 12 17

Indiana Bill of Rights, Article 1, Section 20 17

28 U.S.C. Section 1254(1) 2

Rule 8 of the F.R.C.P. 3, 30

Texts.

	PAGE
Dillard and Hart, Product Liability: Directions for Use and the Duty to Warn, 41 Va. L. Rev. 145, 162 (1955)	26
Manufacturer's Liability for Injuries Caused by His Products: Defective Automobiles, 37 Mich. L. Rev. 18	32
Harper & James, The Law of Torts, Volume 2, Section 16.9, pages 928, 929	16
2 Harper & James, Section 28.5	28
28 Ind. L. Ency., Trial, Section 111	25
Katz, Liability of Automobile Manufacturers for Unsafe Design of Passenger Cars, 69 Harv. L. Rev. 863, 868	14, 29
Noel, Manufacturer's Negligence of Design on Directions for Use of a Product, 71 Yale L. J. 816, 838.	28
O'Connell, "Taming the Automobile," 58 Northwestern L. Rev. 299, 348	15–16
Prosser on Torts, Second Edition, page 119	16
Restatement of the Law of Torts, Second, Sections 395 and 398	23
Restatement of the Law of Torts, Second, Section 395, including subsections (j) and (k) and Section 398.	24
Restatement of the Law of Torts, Second, Section 420A	29
Wade, Strict Tort Liability of Manufatcurers, 19 Southw. L. J. 5, 11	29

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. _____

BARBARA F. EVANS, Personal Representative of the Estate of Roy Evans, Deceased, *Petitioner,*

v.

GENERAL MOTORS CORPORATION, - *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner prays that a Writ of Certiorari issue to review the decision and judgment of the United States Court of Appeals for the Seventh Circuit, dated and entered in this case on April 15, 1966.

CITATIONS TO OPINION BELOW.

The District Court filed no Opinion. The Opinion of the United States Court of Appeals for the Seventh Circuit is printed in Appendix Exhibit "A", pages .. to .., and is reported in 359 F. 2d 822 (West's Advance Sheets).

JURISDICTION.

The Judgment of the Court of Appeals was entered on April 15, 1966. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED.

1. Whether plaintiff's rights to trial by jury as guaranteed by the Indiana Constitution and the Constitution of the United States were denied by the dismissal of her claims against defendant where it does not appear beyond a doubt that the plaintiff cannot prove any set of facts in support of her claims which would entitle her to relief.

2. Whether plaintiff's rights to trial by jury as guaranteed by the Indiana Constitution and the Constitution of the United States were denied by the Court's determining factual issues and the failure to submit factual issues to a jury for determination.

3. Whether the manufacturer of an automobile owes consumers the duty of exercising ordinary care in the design and testing of the design of its automobiles.

4. Whether the manufacturer's duty to a consumer under Indiana law is determined from the relationship between the parties or from the specific facts presented by each individual case.

5. Whether plaintiff's complaint states a claim for relief under Indiana law on the theory of negligence in the design and the testing of the design, and/or

liability for damages caused by breach of implied warranty, and/or the theory of strict tort liability.

6. Whether the Court below erroneously interpreted and applied Rule 8 of the F.R.C.P. by refusing to accept as true all facts well pleaded and the legitimate inferences to be derived therefrom because plaintiff failed to allege certain facts in detail where (a) no motion to make more specific, definite and certain was requested for such facts, and (b) the omitted facts and contentions are outside the issues and theories of plaintiff's claims..

STATEMENT OF THE CASE.

This diversity action was brought to recover damages for the wrongful death of Roy L. Evans, on behalf of his widow and four dependent minor children, as a result of defendant's alleged negligence in the design of his 1961 Chevrolet stationwagon, as alleged in Count I, R. Appendix, pages 3-8, of its breach of implied warranty, as alleged in Count II, R. Appendix, pages 8-10, and in strict tort liability, as alleged in Count III, R. Appendix, pages 10-12. The trial court entered judgments sustaining the first defense of Count I, the first defense of Count II, and the defendant's Motion to Dismiss Count III, each Count being dismissed upon the grounds that each failed to state a claim against the defendant upon which relief can be granted.

Facts—Pleadings.

Plaintiff's Amended Complaint is set forth in the Record Appendix at pages 3-12 and will therefore not here be reprinted.

The allegations of plaintiff's complaint may be summarized as follows:

The defendant General Motors manufacturers and designs the Chevrolet line of automobiles. In the design of the 1961 Chevrolet Stationwagon defendant omitted frame rails located outside the driver and occupants, and incorporated in the design of the automobile what is known as an "X-frame." This type of automobile frame does not have side rails as it is in fact in the shape of an "X." Decedent, Roy L. Evans, was the owner of such a General Motors' designed stationwagon. While driving his automobile, it was struck in the left side by another automobile during an intersectional collision. Decedent received fatal injuries when the left side of the automobile collapsed into and against his body and there was no outer frame protecting him from such a side impact collision, and the "X-frame" with the absence of frame rails located outside the driver permitted the collapse of the body of said stationwagon into his body.

Plaintiff further alleges that the automobile's involvement in a collision was a foreseeable emergency. That the defendant General Motors had knowledge, either actual or constructive, that by omitting side frame rails it was creating an unreasonable risk of harm to the automobile occupants.

Plaintiff further alleges that the automobile should have had a frame providing reasonable protection in the event of a collision of the type used by General Motors and other automobile manufacturers. Attached to plaintiff's complaint and marked Exhibit "A" was a Ford Motor Company ad, reproduced in this Petition at page 7. That a proper frame would have incorporated side rails located outside the automobile occupants.

Plaintiff further alleges that defendant was negligent in the use of the "X-frame" in failing to test the design and in not affording a reasonable amount of safety to the decedent in the event of a collision, all of which proximately caused his death.

The allegations of Count I which are summarized above were, in part, restated in Counts II and III, together with the addition of allegations necessary to establish causes of action for breach of implied warranty and strict liability in tort.

Facts—Evidence That Supports Plaintiffs Theories of Liability.

Since plaintiff was denied the right to trial by jury of her claims there is no evidence in the record. But since the question before this Court is whether plaintiff could prove any set of facts in support of her claims which would entitle her to relief, we here briefly set forth some facts which are available in printed form. Plaintiff is precluded from here presenting discovery evidence, including deposition testimony and interrogatories and answers thereto, the opinions of experts in

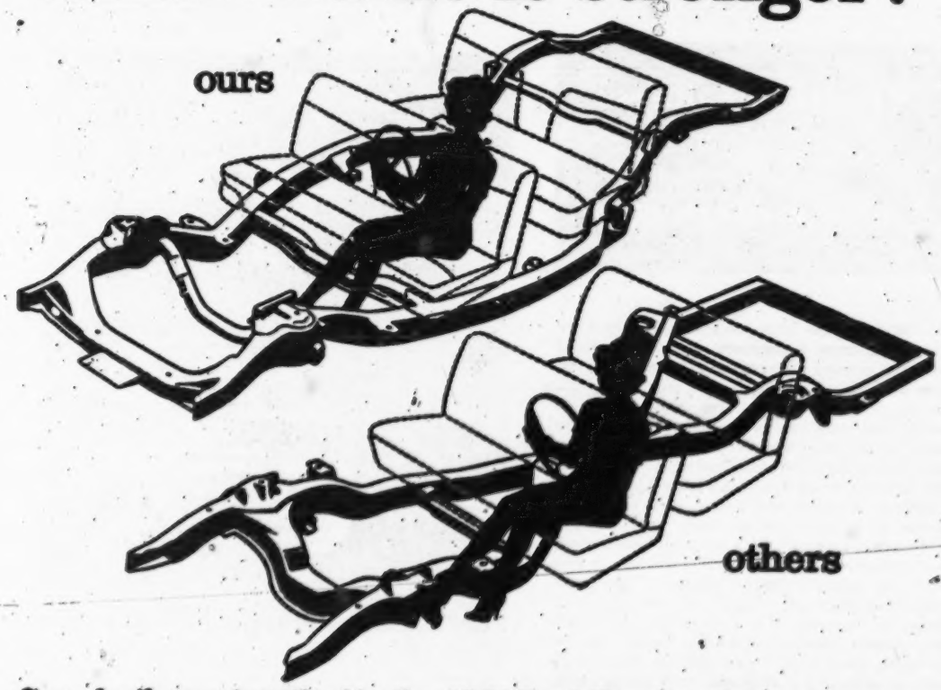
the design and construction of automobiles, crash injury experts, the testimony of witnesses to the collision, and the automobile, all of which plaintiff would offer into evidence at the jury trial.

The theories of plaintiff's claims are evidenced, in part, by the aforementioned Exhibit "A" attached to her complaint as shown on page 7 of this Petition. This particular Ford Motor Company ad was published on page 7 of the June 1961 Popular Mechanic magazine.

Plaintiff's theories are further supported by a visual comparison with frames defendant General Motors, and other manufacturers (Ford), used in automobiles manufactured prior to the design and manufacture of the decedent's automobile. Plaintiff in rhetorical paragraph 12 of her complaint alleged that in the years 1959, 1960 and 1961 defendant was using a perimeter frame which incorporated guard-beam frame rails located outside the automobile's occupants in another line of automobile which it manufactured. On page 9 of this Petition, we have reprinted a page from a 1959 Oldsmobile style pamphlet which pictures two views of the 1959 General Motors Oldsmobile frame which is a "perimeter frame" that also incorporates an "X" member in its design. This Court should note, and we have emphasized in red, the important aspects of this exhibit and that the defendant General Motors in *1959* stated that these Oldsmobiles were so constructed that the frame provided:

> "Solid steel side rails provide added protection against impacts on the body sides."

Which frame is stronger?



Guardrail construction in the 1961 Ford Family of Fine Cars has greater rigidity, offers the strength of strong side rails.

Ford Motor Company builds better bodies

• Millions of car frames are shaped like an "X." Weak in the middle, they lack the strength of strong side rails. Guardrail frames in Ford and Mercury curve out. They are strong in the middle. Guard rails also protect passengers in the unitized bodies of Falcon, Thunderbird, Comet and Lincoln Continental.

• In the Ford Family of Fine Cars, the most vulnerable underbody parts are galvanized, zinc-coated to protect them against rust and corrosion.

• Doors in our cars are stronger. They are reinforced with steel beams. This means they are more rigid and therefore close tighter and quieter, reducing the likelihood of developing squeaks and rattles.

• One reason for the unusually quiet ride in the Ford Family of Fine Cars is the soundproofed floors. Where other cars have only two layers of sound insulation, our cars have three layers of sound insulation. Each layer eliminates a different range of sound from rumbles to squeaks. As a result, very little noise gets through to the passenger compartment.

These are 4 of the many reasons we think you will find (upon comparing our cars with other cars) that Ford Motor Company builds better bodies.

Ford

American Road, Dearborn, Michigan

FORD · FALCON · THUNDERBIRD · COMET · MERCURY · LINCOLN CONTINENTAL

Chassis weakness in some modern cars

IN DISCUSSING the 1959 automobiles in the April 1959 BULLETIN, Consumers' Research pointed out that in many respects the 1959 cars were less safe than previous models and particularly directed attention to the frame designs, some of which had been changed in drastic fashion in order to provide means for increasing the headroom in the "low silhouette" cars. We noted that the X frame design shown in Figure 1, as used by Cadillac, Chevrolet, and Pontiac, was sufficiently strong to support the car body and passenger weights satisfactorily but that it afforded much less protection for passengers than the frames with side rails, as seen in Figure 2. Side rails often help protect the driver and passengers from injury in the event of a sidelong collision, which is a common kind of collision or impact (as, for example, when a car slides sidewise into a wall, pole, or post, in a skid or spin, or is struck amidships at an intersection by a careless driver coming in from a side road, or trying to beat a light).

Figure 1

The "X"-type frame used by Chevrolet, Pontiac, and Cadillac; this design of frame is considered less desirable than others from the standpoint of safety of driver and passengers.

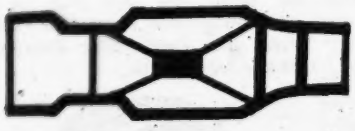


Figure 2

Most makes of cars have a frame with side rails similar to that shown directly above. Exceptions to this type are Cadillac, Chevrolet, and Pontiac, and cars with unit body frames.

Wide World Photos

The picture above, which appeared recently in newspapers served by the Associated Press, illustrates very forcefully the weakness of the X-type of chassis frame. The driver lost control of the car on a slippery road, and the car, a *Chevrolet Impala*, struck the tree broadside with the result that the car was broken into two parts. The frame fractured at the "intersection" of the X.

Had this car been equipped with a conventional chassis construction, with side rails, it is extremely unlikely that the impact would have broken the frame; in many similar accidents in the past, few if any cases have been seen with the astonishing type of failure illustrated in the accompanying photo. We believe this is but one of many ways in which automobile manufacturers give more weight than is warranted to considerations of minor importance (a "low profile," in this instance) oftentimes at the cost of reductions in the effectiveness of safeguards that would serve to protect the driver and passengers in the event a collision or upset occurred.

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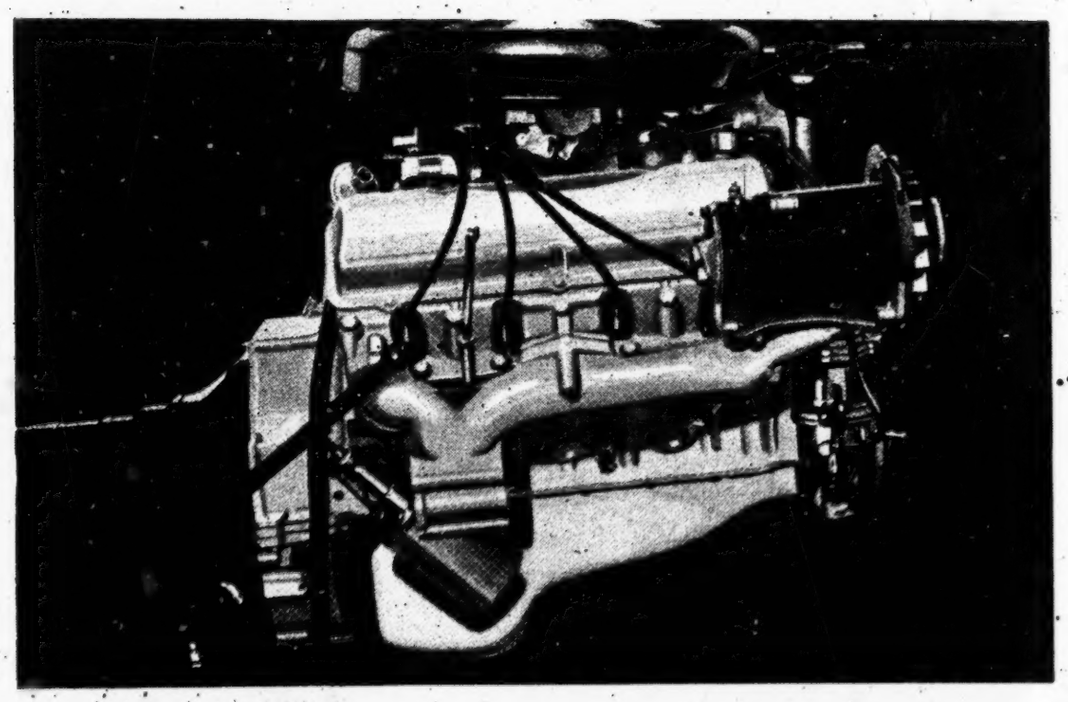
Advanced "RIDE ENGINEERING"

A MASTERFUL BALANCE OF ENGINE AND TRANSMISSION... SUSPENSION AND STEERING ...FOR YOUR COMFORT AND SECURITY

Out of Oldsmobile's continuing search for new and better ways to engineer an automobile have come many trend-setting developments. For 1959, advances have been made in every component of Oldsmobile's chassis and power team. What's even *more* important to you is that each individual design improvement has been made with careful attention to its effect on the whole. The result of this "Ride Engineering" is a smoother, quieter, more responsive automobile . . . with an exceptionally "solid" feel. You are invited to try Oldsmobile's unique "Glide" Ride.



RUGGED NEW ROCKET ENGINE ...quieter, more powerful than ever!

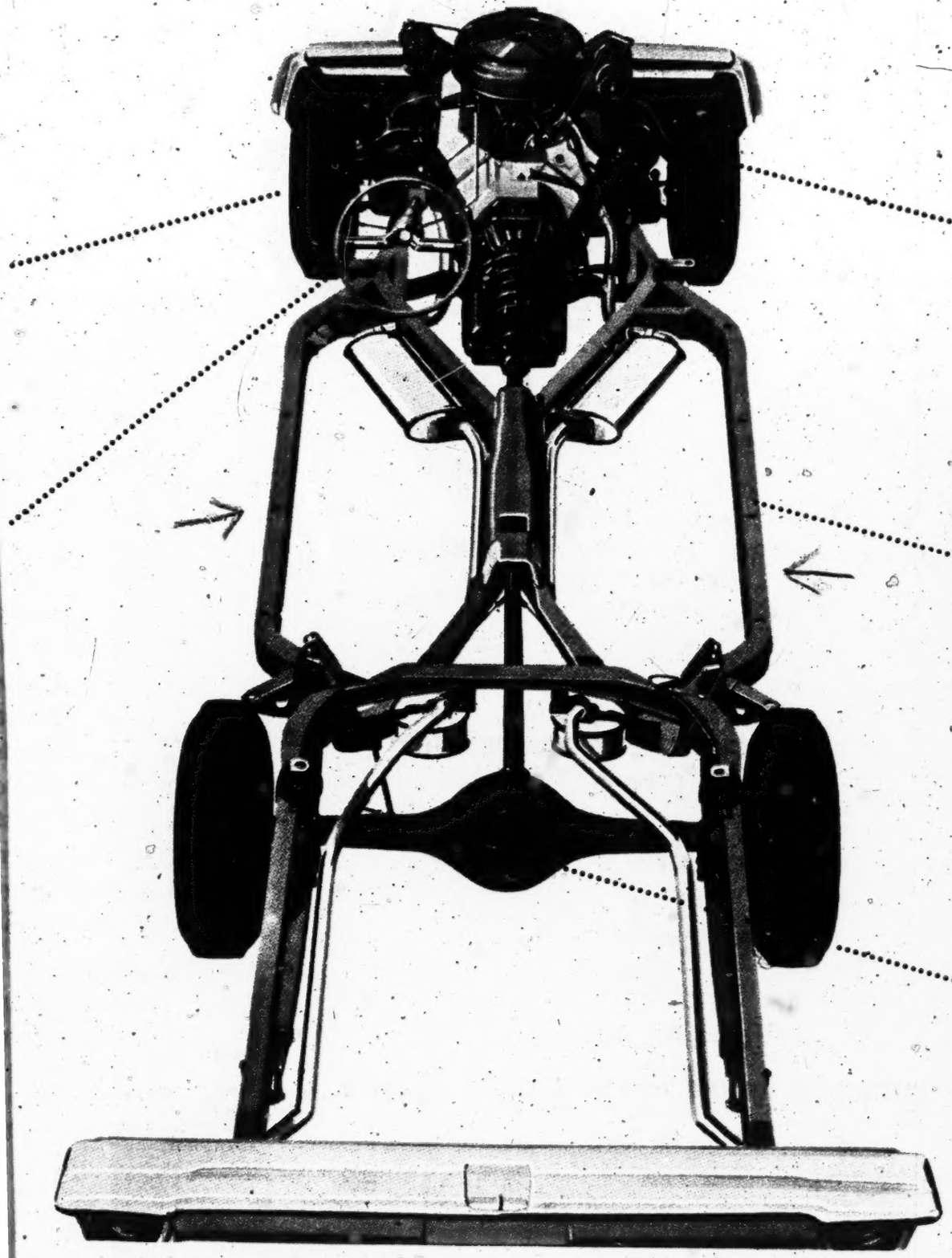
Oldsmobile's new Rocket Engine for Ninety-Eight and Super 88 models (see below for specifications of Dynamic 88's Rocket Engine) brings you the most extensive engine advances in a decade! The 1959 Rocket is bigger . . . features larger cylinder bores, increased displacement. It produces a husky 315 h.p., 435 lb.-ft. torque. And does it more efficiently than ever. New Free-Flow intake manifold design, larger intake valves and a new fuel-saving automatic choke give the thrift-famous Rocket even greater gas economy. It's a smoother, quieter Rocket, too! Olds engineers lengthened the cylinders to give greater piston support, added new conical valve springs for quieter valve operation, designed the most rigid crankshaft and block in the industry.

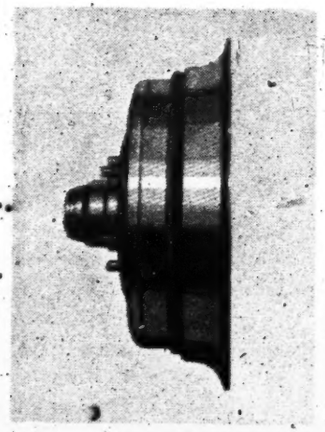
ADVANCED JETAWAY HYDRA-MATIC

Geared for go! Jetaway's positive gearing gives you alert performance . . . maximum efficiency and economy at every speed. New Jetaway, with its two fluid couplings and improved clutches, gives smooth-as-silk shifting through every gear. And lever-type selector makes gear selection as simple as the flick of a finger.

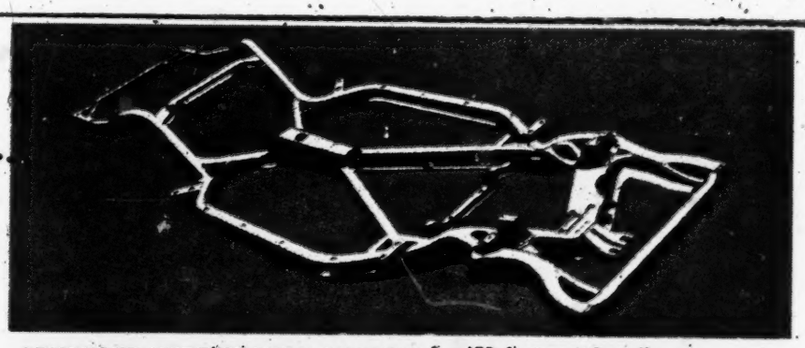
ENGINE DATA—*Ninety-Eight and Super 88 series: 394 cu. in. Rocket Engine with 315 h.p., 435 lb.-ft. torque, 9.75-1 compression ratio and Quadri-Jet Carburetor is standard.*

Dynamic 88 series: 371 cu. in. Rocket Engine with 270 h.p., 390 lb.-ft. torque, 9.75-1 compression ratio and Econ-o-way *Carburetor is standard. Quadri-Jet Carburetor optional at extra cost.*





NEW AIR-SCOOP BRAKES ON ALL FOUR WHEELS— New, cooler-running Air-Scoop Brakes add many miles to brake lining life! Newly designed brake drum flange has 88 square inches more metal area to help dissipate heat . . . also acts as an air scoop, directing cool air across the brakes! Larger wheel cylinders reduce braking effort.



ADVANCED WIDE-STANCE CHASSIS for '59 features the all-new Guard-Beam Frame . . . the strongest, most stable frame in Olds history! It combines heavy U-channel and box-member side rails with a huge center X-member. Body is mounted directly to the nine-inch wider frame, reducing vibration for a smoother, quieter "Glide" Ride. Solid steel side rails provide added protection against impacts on the body sides. New king-pin angle improves cornering and wheel-return after turning . . . also reduces "wheel-fight" due to road irregularities. Wider front and rear tread and spring base give added resistance to sidesway.

ADVANCED ANTI-SPIN REAR AXLE picks a sure-footed path through ice, snow, mud or sand. Instead of feeding power to the wheel that's spinning, it transfers power to the wheel with the grip.

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Defendant in its 1961 Oldsmobile style pamphlet, also recognized the frame as a safety feature in the design of its Oldsmobile:

> ". . . Oldsmobile's Guard-Beam Frame gives the car strength to spare . . . gives *passenger safety in reserve! Box-section steel members form the frame sides and extend their protective strength from end to end. These husky rails act as steel barriers at the sides of the seat to give you maximum protection all around. You ride cradled within the frame!"* (Our emphasis.)

An article appearing in the November 1959 CONSUMERS' BULLETIN is reprinted in this Petition in full on page 8. It would be offered as evidence that defendant knew or should have known of the claimed defect in 1959 or soon thereafter.

There is evidence from General Motors' publication "THE AUTOMOTIVE EXAMINER," which demonstrates that defendant admits that there is greater strength and protection in the Oldsmobile perimeter type frame than the frame incorporated in some other General Motors' lines. In boasting of the advantages of the Oldsmobile perimeter frame and comparing the disadvantages of other General Motors' automobiles, the defendant on various occasions wrote:

> *Chevrolet*—"Jetstar 88's *Guard-Beam Frame* with sturdy side rails and torque-box construction offers *sturdy protection* and provides a firm foundation for a smooth, quiet ride." Impala's X-type frame does not have side rails or torque-box construction." (Our emphasis.)

Buick — "Jetstar 88's have a Guard-Beam Frame that offers stability, through rigidity, and *added protection with rugged side rails;*" and, "Oldsmobile's exclusive Guard-Beam Frame helps provide a sturdy ride and the *extra margin of protection that goes with a perimeter type frame.* Buick uses the X-type frame;" and, "Oldsmobile's Guard-Beam frame rings the passenger compartment with a steel perimeter which provides protection and gives the body rugged support at the sides." (Our emphasis.)

Cadillac—"The Oldsmobile has a strong, sturdy Guard-Beam Frame which not only provides the foundation for an unusually quiet, smooth side but *extra perimeter protection as well.* Cadillac uses an X-type frame." (Our emphasis.)

Additional evidence was set forth in plaintiff's Brief filed with the U. S. Court of Appeals and may be found on pages 4 to 24, 38, 39-41, 44-45, 48-50. Because the Appendix and Brief filed with the U. S. Court of Appeals for the Seventh Circuit were bound in one volume this material is also on file with the Clerk of this Court.

REASONS FOR GRANTING THE WRIT.

1. The majority opinion of the Court below adversely decides to this Petitioner a question of great national significance, erroneously under Indiana law, in contravention of decisions of the Indiana Supreme and Appellate Court and other U. S. Circuit Courts of Appeal and U. S. District Courts, and of this Court.

The importance of the decision and the need for review here should not be underestimated. Judge Kiley in his dissent demonstrates a clear recognition of the importance of the problem.

President Lyndon B. Johnson, in a Whitehouse Press Release on February 2, 1966, stated:

> "You and I know that the gravest problem before this nation—next to the war in Viet Nam—is the death and destruction, the shocking and senseless carnage, that strikes daily on our highways and that takes a higher and more terrible toll each year."

That in excess of 45,000 people a year are killed in traffic accidents, and more persons are killed and injured each year than in all the wars in which our Country has been involved is evidence of the importance of this litigation.

It is respectfully submitted that this litigation is of importance to the Country as a whole, to the residents of Indiana, and, of course, to this plaintiff and her minor children. One only has to look to the Indiana highway fatality statistics in the period 1961 to January 1966 to find the following horrifying figures:

40 Hoosiers died fighting in Viet Nam yet in only three summer holidays in 1965, 61 were killed on Hoosier highways; this Country had had 3,662 deaths in Viet Nam but Indiana alone had 7,316 casualties on its highway. Evansville Press, July 1, 1966.

The cause of all injuries and deaths was for years assumed to be the result of the negligent operation of the vehicle on the highway. Research has revealed that it is not the impact between the two vehicles and/or object that causes the injury and/or death, but it is the impact between the vehicle, occupant, and the vehicle interior or some other object which causes the damage. This is the so-called "second accident." KATZ, *Liability of Automobile Manufacturers for Unsafe Design of Passenger Cars,* 69 Harv. L. Rev. 863, 868.

Professor James J. Ryan, Director, Automotive Safety Research Project, Professor of Mechanical Engineering, University of Minnesota, in an article entitled "Reduction in Crash Forces," estimates that through engineering and design changes in American automobiles, the yearly injury and death totals could be reduced about one-half. FIFTH STAPP CONFERENCE, page 48.

The majority opinion below would, among other things, remove from the tort law the duty to exercise ordinary care in the design and testing of the design of automobiles for defects which would only occur during a collision. Although more than one-fourth of all automobiles are at some time during their use involved in an accident producing injury, O'CONNELL, "Taming

the Automobile," 58 Northwestern L. Rev. 299, 348, and a large percentage of these collisions represent side impact collisions, *Traffic Hearings Before a Subcommittee of the Committee on Interstate and Foreign Commerce House of Representatives, 84th Congress, Second Session,* page 908, the Court below would relieve defendant from liability even where it was creating an unreasonable risk or harm to consumers.

This litigation, defendant would argue, presents a new and novel theory of liability that would require it to be an insurer of all auto accidents. The "Failsafe" principle is not of origin in this case. See: O'CONNELL, "Taming the Automobile," 58 Northwestern L. Rev. 299, 348. The restraining factor in this litigation may be found in plaintiff's theory of liability which seeks recovery because of the unreasonable risk created by defendant. Liability under such circumstances would not make defendant an insurer.

To extend "crashworthy" engineering principles to the consumer would only reflect the true nature of the common law. Nonliability and the denial of the right to trial by jury are at variance with the modern day needs of the consumer.

2. The decision is in conflict with applicable State law and deprives plaintiff of the right to trial by jury in violation of both her Indiana and United States Constitution guarantees.

The law is well-settled that on a motion to dismiss as applicable to the Third Count of plaintiff's complaint and the first defense to Counts I and II of plaintiff's complaint, each of said defenses and motion presenting the question that plaintiff's complaint fails to state a claim, the Court should assume the truth of all the allegations in the complaint; and the complaint should not be dismissed unless it appears beyond doubt that the plaintiff cannot prove any set of facts in support of her claim which would entitle her to relief. *Conley* v. *Gibson,* 1957, 355 U. S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80.

It is Hornbook and Indiana Law that the elements of a cause of action for negligence are: (1) a relationship between the parties such that the actor has a duty toward the plaintiff, (2) a breach of that duty by some act of negligence, (3) which proximately causes, (4) damage to the plaintiff. Negligence is a matter of risk of recognizable danger of injury. Defined as "conduct which involves an unreasonably great risk of causing damage" or as conduct "which falls below the standard established by law for the protection of others against unreasonably great risk of harm." *McCloud* v. *Leavitt Corporation,* D. C. Ill., 1948, 79 F. Supp. 386, 291; PROSSER ON TORTS, Second Edition, page 119; HARPER & JAMES, THE LAW OF TORTS, Volume 2, Section 16.9, pages 928, 929.

The common law aspect of this controversy is, of course, under the doctrine of *Erie R. Co.* v. *Thompkins,* 1938, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, covered by the substantive law of Indiana.

Under the Indiana Bill of Rights, it is provided, in part, in Article 1, Section 12: ". . . Every man for injury done to him in his person, property, or reputation shall have remedy by due course of law," and, in Article 1, Section 20: "in all civil cases, the right of trial by jury shall remain inviolate."

The effect of the decision of the Court below sustaining the dismissal of plaintiff's claims deprives this plaintiff of the right to trial by jury just as surely as the sustaining of a directed verdict. In the latter instance at least the Court has permitted the plaintiff to introduce evidence in support of her claim.

The Indiana Courts have repeatedly held that because of the above constitutional right to trial by jury, "The law very zealously protects one against whom a motion for a directed verdict is addressed . . . ." *Estes* v. *Anderson Oil Company,* 1931, 93 Ind. App. 365, 176 N. E. 560. In *Bradford* v. *Chism,* 1963, 134 Ind. App. 501, 186 N. E. 2d 432, and *Coleman* v. *Mitnick,* 1964, —— Ind. App. ——, 202 N. E. 2d 577, 578, citing with approval the holding in *Garr* v. *Blissmer, et al.,* 1961, 132 Ind. App. 635, 177 N. E. 2d 913, which interpreted the Constitution as placing: ". . . a heavy restraining hand upon the Courts to deny the submission of a cause brought in good faith and based upon a situation involving far reaching and serious consequences to the plaintiff."

The Court should be just as willing to protect the parties' rights to trial by jury at the pleading stage as it is at the directed verdict stage, and what can be said as to protecting a parties' rights and directing a verdict should apply equally to a ruling on a motion to dismiss.

(a) The Court below fails to follow Indiana law in determining the duty defendant owed to the decedent consumer from the relationship between the parties.

Duty arises out of the relationship between the parties under Indiana Law and is in no way dependent upon the factual basis of the litigation. The application of a different method for determining the manufacturer's duty in this case creates a conflict between the result that could be expected to be obtained in a State court and the result obtained in this diversity proceeding.

Defendant admits, and the Court below recognizes some duty was owed to the decedent consumer. We submit that under Indiana law and the holding in *Union Traction Co.* v. *Berry,* 1919, 188 Ind. 514, 520, 121 N. E. 655, 32 A. L. R. 1171, a jury question was thus presented. Duty arises out of the relationship. Plaintiff needed to show nothing further than relationship to satisfy the duty requirements.

The Court clearly held that the only legal question for a Judge to decide is the relationship between the parties. Once the duty to use care is established then the Court must leave to the jury the question of whether the conduct of the defendant measured up to ordinary

care. Because of the importance of this holding and the error of the Court below in failing to follow same, we quote extensively here below:

"The law requires nothing more than duty; it will excuse nothing less. *The duty to exercise care for the safety of another arises as a matter of law out of some relation existing between the parties,* and it is the province of the Court to determine whether such a relation is shown as gives rise to such duty. In determining whether the relation shown gives rise to a duty to use care, the Court decides a pure question of law. This question cannot be submitted to a jury. *Where a duty to exercise care exists, it is always the same regardless of the nature of the relation out of which it arises. It cannot be said that the duty to use care which arises out of the relation of carrier and passenger differs in kind, character, or degree from the duty which arises out of the relation of master and servant, or out of any other relation which imposes the legal duty to use care."* (Our emphasis.)

"In submitting the determination to a jury of a question of negligence, which is a mixed question of law and fact, the court is required to define the duty which the law imposes. *This duty is defined by the law as 'due care', 'ordinary care', or 'reasonable care,'* which terms are regarded by the courts as having the same significance. It is also the duty of the court to state the rule fixing the standard of care which will measure up to the duty imposed by law. *The court should then leave it to the jury to decide whether the acts and conduct of*

the defendant in respect to the matter before the court measures up to the standard of care fixed by the law. . . ."

In *Belt, etc. Co.* v. *McClain,* 58 Ind. App. 171, 176, 106 N. E. 742, it is again emphasized that duty arises from the relationship of the parties. The Court stated:

> "Where an act is alleged to have been negligently done or negligently omitted, the conditions and circumstances under which it was done or omitted are not necessary in a pleading for the reason that it is not the province of the court to judge from study conditions and circumstances whether ordinary care required the act to be done or omitted. That is the peculiar province of the jury. The duty to use care in favor of appellee being shown, it is sufficient to charge that the acts or omissions specified were negligently done or omitted. The general duty to use care in favor of the plaintiff which arises as a matter of law from the relation between the parties as shown by the complaint is broad enough and comprehensive enough to include every specific act that ordinary care requires in the discharge of such duty. When the general duty to use care is shown an allegation that ordinary care required the performance of a particular act is sufficient to bring such act within the scope of the general duty imposed by law. An allegation that an act was negligently done or negligently omitted is equivalent to an allegation that the defendant failed to exercise ordinary care in the discharge of this duty."

The contention by counsel that there is no duty conflicts with the testimony of defendant's President

James M. Roche before Congress on March 22, 1966, before the Subcommittee on Executive Reorganization of the Committee on Government Operations, United States Senate. President Roche testified, in part:

> "Without straying too far from the purposes of today's hearings, I do want to stress that GM is expanding its research, engineering and testing in all areas of safety, including that of the 'second collision' and the causes of both accidents and injuries. We are stressing safety in our advertisements and consumer contracts, and adding new safety features to our cars as fast as they can be effectively developed, carefully tested and thoroughly proven to be practical. We are in every other way devoting more time, imagination, attention, manpower and statistical studies than ever before to this all-important safety factor. We are in short, in all our plans and calculations, giving safety a priority second to none. *And we consider this to be our duty.*"

The defendant General Motors admits in its pamphlet, DESIGN FOR SAFETY, page 2, that automobile safety involves the car, the driver, and the road and that "The manufacturer's purpose is to produce a safe car." The defendant further states:

> "Cars must be—and are made as safe as possible with existing knowledge and practical limitations. Since the early days of the automobile the objective has been to make a car move—and to make it move safely. That is true today. *Safety is a major objective of General Motors in the de-*

sign, manufacture and testing of its car, and will always remain so.

"Some things are put on cars as specific safety features—seat belts, padded interors, etc. *Important as they are, these sometimes obscure the fact that they would be of little help—or at the least of less help if the structural integrity of the car itself did not provide durability, reliability, and safety. Safety does not arise by adding 'safety' items to a car, instead of building safety into it originally.*" (Our emphasis.)

And, at pages 29-30, defendant further states:

"The first all steel body gave passengers protection against far more than just the weather. Strong tough steel afforded more protection against impact forces. Passengers were incased in steel front and back, both sides, roof and floor."

In another General Motors pamphlet, Statements by General Motors Corporation before the Michigan Senate Highway Committee, page 35, defendant's representatives testified:

"As in the past, our (General Motor's) future efforts will have a dual objective. First, to design products which have a high degree of build-in safety and characteristics to provide drivers with a high capability of avoiding accidents. Second, to design products which prevent or minimize injuries in the event an accident does occur."

(b) The decision in this diversity action is contrary to applicable state law and is in conflict with decisions of the Federal Court's interpretation of Indiana Law.

The classic opinion of Judge Cardozo written sixty years ago is the law of Indiana. Subsequent to the *MacPherson* case, every decision of the Indiana Appellate or Supreme Courts has followed in reasoning in the *MacPherson* case. *J. I. Case Company* v. *Sandefur,* 1964, ____ Ind. ____, 193 N. E. 2d 647, 197 N. E. 2d 519; *Coca-Cola Bottling Works of Evansville* v. *Williams,* 1941, 111 Ind. App. 574, 37 N. E. 702; *Holland Furnace Co.* v. *Nauracaj,* 1938, 105 Ind. App. 574, 14 N. E. 2d 339. The Wisconsin Supreme Court recognized its applicability in Indiana in *Wojciuk* v. *U. S. Rubber Co.,* 1961, 13 Wis. 2d 173, 108 N. W. 2d 149.

The decisions of other jurisdictions and the reference to the *Restatement of the Law of Torts, Second,* Sections 395 and 398, cited by Judge Kiley in his dissent show that the majority below failed to follow not only controlling Indiana law, but also failed to follow in the mainstream of the law of products liability in this country.

Judge Schnackenberg's opinion in *Elliott* v. *General Motors Corp.,* CCA 7th, 1961, 296 F. 2d 125, was cited approvingly by the Indiana Supreme Court in *J. I. Case* v. *Sandefur, supra.*

The late Judge Lindley wrote in *McCloud* v. *Leavitt Corp.,* DC Ill. 1948, 79 F. Supp. 286, 291:

> ". . . As I have said, in a tort action as I think the Indiana Courts now look at it, the ques-

tion is . . . whether plaintiff has charged negligence which it might reasonably have been foreseen, would naturally and probably result in injuries to third persons . . ."

The trial judge in *Dagley* v. *Armstrong Tire and Rubber Co.,* CCA 7th, 1965, 344 F. 2d 245, tried to a jury plaintiff's claim for negligent design of a tire.

Under Indiana law, even where there is no duty if the defendant undertook to provide additional protection against impact on the body sides (such as shown by the Oldsmobile ad), having undertaken so to do it is liable for the damages sustained on account of its failure to exercise reasonable care. *Robertson Music House* v. *Wm. H. Armstrong Co.,* 1929, 90 Ind App. 413, 415-416; and *Hamilton, Exr.* v. *Feary,* 1893, 8 Ind. App. 615, 35 N. E. 48, 52 Am. St. Rev. 485.

Hand in hand with the duty to exercise ordinary care in the design of the automobile is the duty to test the design. What has been said relative to design duty is likewise applicable to the duty to test the design. It is shocking to think that automobiles could be manufactured by the defendant without any tests for design created defects and yet there would be no liability under holding of this case.

With the relationship established, the adoption of the *MacPherson* rule in Indiana, the holding of other Circuits as cited in Judge Kiley's opinion, the public admissions of defendant's representatives, and the *Restatement of the Law of Torts, Second,* Section 395, including subsections (j) and (k) and Section 398, there is an abundance of evidence that the Court below

has erroneously decided a factual question which should have been submitted to a jury, erroneously decided in conflict with Indiana law that an automobile manufacturer does not have to exercise ordinary care in the design and manufacture of an automobile, and has denied plaintiff the right to trial by jury.

3. Petitioner was further denied her constitutional rights to trial by jury by the Court below deciding questions of fact.

Under Indiana law the jury is the exclusive judge of all questions of fact. 28 *Ind. L. Ency., Trial,* Section 111. An examination of the Opinion of the majority of the Court below establishes that not only would the Court reach a factual decision in arriving at its interpretation of the duty owed to the decedent but the Court by its decision withdrew from the juries consideration the factual issues as to negligence, contributory negligence, foreseeability, proximate cause, whether decedent's use of the automobile was ordinary or an emergency use which could have been reasonably anticipated, and whether defendant created an unreasonable risk.

Plaintiff in *Meyer* v. *Greenwood, et al.,* 1955, 125 Ind. App. 288, 124 N. E. 2d 870, 872, sued in three counts: common law negligence, breach of implied warranty, and violation of Indiana Statutes concerning adulterated foods. Plaintiff contracted trichinosis from eating pork purchased from defendants. Whether plaintiff had properly cooked and used the pork was held to be a question of fact for the jury. The Court

further held that if there were any limitations as to the defendant's implied warranty, it would be necessary for defendant to plead same by an answer.

In DILLARD AND HART, *Product Liability: Directions for Use and the Duty to Warn,* 41 Va. L. Rev. 145, 162 (1955), the authors state:

> "To assert that the manufacturer is responsible for damages done only when the product is used in the ordinary and expected manner is simply another way of saying that he is liable only if it is foreseeable that the article will be used in a dangerous way."

The Indiana Appellate Court in *S. I. G. & E. Co.* v. *Caine,* 1964, —— Ind. App. ——, 98 N. E. 2d 14, 18, the Court held that foreseeability was a question "upon which the jury was entitled to pass."

Contributory negligence is a question of fact for the jury. *King's Indiana Billiard Co.* v. *Winters,* 1952, 123 Ind. App. 110, 119; 106 N. E. 2d 713. (Case includes citations to numerous authorities.)

In *Tabor* v. *Continental Baking Co.,* 1941, 110 Ind. App. 633, 38 N. E. 2d 257, 261, the Indiana Appellate Court held: "What is the proximate cause of an injury is ordinarily a question of fact for the jury."

The automobile manufacturer's design duty to a consumer was said to include, in *Davlin* v. *Henry Ford & Son, Inc.,* CCA 6th, 1927, 20 F. 2d 317, 319:

> "Its duty . . . to use reasonable care in employing designs . . . which would fairly meet any emergency of use which could reasonably be anticipated."

In *Kahn* v. *Crysler Corporation,* DC Tex, 1963, 221 F. Supp. 677, 679, the Court defined the extent of automobile manufacturer's duty:

> "The duty of the automobile manufacturer extends to the ordinary use of the vehicle, and may even be such as to cover certain situations when the automobile is being negligently used."

The manufacturer's duty included the duty to design the product so that it will meet "emergency use" which could be reasonably anticipated. *Halpern* v. *J. A. D. Construction Corp.,* 1960, 27 Misc. 675, 202 N. Y. S. 2d 945.

In *Hardman* v. *Helene Curtis Industries, Inc.,* 1964, 48 Ill. App. 2d 42, 63, 198 N. E. 2d 681, 691, the Court held:

> "the essential question presented by a claim of breach of implied warranty of merchantability is whether the product failed to safely and adequately satisfy the uses to which such products are ordinarily put.
>
> ". . . *the question of ordinary use is as much a question of fact as is the question of what is a foreseeable use.*" (Our emphasis.)

Plaintiff claims Count I rhetorical paragraph 9 alleges the foreseeability by the defendant General Motors of a side impact collision as described in plaintiff's complaint and that "drivers would be seriously injured and/or killed *because* of the absence of frame protection and the seating of the driver outside the 'X-Frame.'" In rhetorical paragraph 10 plaintiff

alleges that defendant had knowledge that it was creating an "unreasonable risk of causing substantial bodily harm and/or death to persons driving the automobile by not having reasonable and adequate frame protection from side impact collisions located outside the driver."

Defendant by its motion to dismiss has admitted these facts. *U. S.* v. *Shubert,* 1955, 348 U. S. 222, 75 Supp. Ct. 277, 99 L. Ed. 279; *Mandeville Island Farms* v. *American Crystal Sugar Co.,* 1948, 334 U. S. 219, 68 Supp. Ct. 996, 92 L. Ed. 1328.

A jury question on these issues is therefore presented. NOEL, *Manufacturer's Negligence of Design on Directions for Use of a Product,* 71 Yale L. J. 816, 838; 2 HARPER & JAMES, Section 28.5.

4. The Court fails to apply appicable Indiana law on breach of implied warranty and strict liability in tort as set forth in *Restatement of the Law of Torts, Second,* Section 402A.

The Court cites us to no Indiana decision and the writer has been unable to find any such holding that would deny liability to this plaintiff under either of the theories.

The decision of the Court below is contrary to a decision rendered by Judge Hastings in *Dagley* v. *Armstrong Tire and Rubber Co., et al.,* CCA 7th, 1965, 344 F. 2d 245, and is at odds with the decision of Judge Eschbach in *Greeno* v. *Clark Equipment Co.,* DC Ind., 1965, 237 F. Supp. 427.

The above decisions were arrived at in the absence of any decision in Indiana interpreting the *Restatement of the Law of Torts, Second,* Section 420A, but after looking at all available data both Courts adopted the rule which it believed the Indiana Supreme Court would follow. In the instant case no effort was made to decide what position Indiana would follow nor was any reason given for creating a division within the Circuit as to strict tort liability.

WADE, *Strict Tort Liability of Manufacturers,* 19 Southw. L. J. 5, 11, summarizes the jurisdictions that have adopted strict tort liability and as of 1964 indicates there are 29 states in which it is recognized, 12 states in which it is not and 9 states remained uncommitted. He states at page 12:

> "It has been only a half-dozen years since the first decision was rendered applying strict liability to articles other than food products. Already there are holdings or other indications in about half of the states that strict liability will extend beyond food products. A movement this rapid is almost completely unprecedented and is indicative of a strong trend amounting to a groundswell. When this development is combined with the authority of the Restatement and of the numerous writers in the field, the future of the law becomes quite clear."

See also: KATZ, *The Liability in Tort or Warranty of Automobile Manufacturers for the Inherently Dangerous Design of Passenger Automobiles,* 37 Chi. B. Rec. 363.

5. The Court erroneously interpreted and applied Rule 8 F.R.C.P. by refusing to accept as true all facts well pleaded and the legitimate inferences to be derived therefrom because plaintiff failed to allege certain facts in detail as required by the outdated and archaic methods of pleading.

Defendant filed no motion to make such facts part of plaintiff's complaint and some of the omitted facts are completely outside of the issues and theories of plaintiff's complaint.

Plaintiff's claims are based upon defendant's removal from the design of its 1961 Chevrolet automobile of frame rails located outside the automobile's occupants thereby creating a body construction not only of insufficient strength to withstand impact but the absence of frame rails thereby increasing the amount and depth of penetration of the impacting automobile. The absence of frame rails permitted a violation of the passenger compartment. The removal of the frame rails thus removes from the impacted automobile a substance to deflect and minimize the impacting forces and the collapsing left side of his automobile. Safety was not built into the structural integrity of this car—the safety device was in fact removed under the design. With decedent's automobile incapable of providing its occupants with minimal protection in the foreseeable event, *i. e.*, a side impact collision, decedent was killed by the so-called "second accident" which involved his body.

It is thus completely outside the issues of this case, the theories of plaintiff's claims and wholly irrelevant for the Court to hold that the plaintiff does not contend (failure to allege) that the frame could have avoided the collision, or to assert (failure to allege) that the frame caused the automobile to be driven into the path of the striking car or out of its path. Suit here is for defendant's liability arising out of the "second accident" and not the first.

Plaintiff's allegations that the absence of frame rails and the use of the X-frame permitted the collapse of the side of the automobile into plaintiff causing his death. There is no allegation that the striking car's force would have killed decedent and the inference most favorable to plaintiff is that it would not have.

Defendant filed no motion to required plaintiff to allege that the decedent would not have been killed in the same collision. I can assure this Court that plaintiff is sincere in the prosecution of these claims. We would be in bad faith with the Courts if we did not contend and have evidence that the conduct of the defendant brought about the death of decedent. The proof upon this would of course have to be presented at a jury trial under the applicable rules of evidence and causation.

By reverting to the standards of common law pleading, no longer required under the Federal Rules, and in rendering a decision against plaintiff because it failed to plead certain facts in detail will set the F.R.C.P. back fifty years and would nullify the holding of this Court in *Conley* v. *Gibson, supra.*

LEGISLATION.

The law of products liability in Indiana as in this Country in general developed without legislation. *MacPherson* v. *Buick Motors Co.*, 1916, 217 N. Y. 382, 111 N. E. 1050, has been adopted in every state except Mississippi. 78 HARV. L. REV. 1952 (1965).

The suggestion that action first be taken by legislation seems to completely ignore the history of the common law and how it has grown. In 1938, Lester W. Feezer in an article entitled MANUFACTURER'S LIABILITY FOR INJURIES CAUSED BY HIS PRODUCTS: *Defective* Automobiles, 37 Mich. L. Rev. 18, commented upon this very argument.

> "This attitude upon the part of courts is evaive of the judicial responsibility which the common law implicity imposes upon the judge to make the law serve the ends and needs of justice in a changing world. It has been the boast of the common law that it possesses the flexibility to accomplish this end. It is impossible to imagine legislation which will anticipate the innumerable variety of situations which might arise. Thus, adequate provision for handling such cases would be attained only after considerable experiment by the legislature in passing statutes and by the Courts in interpreting them. Legislation of this sort would doubtless be opposed by powerful lobbies of manufacturers able to enlist the further support of publishers who would have an interest based on the expectation of advertising. Local dealers, as a part of the manufacturers' distributing system, would be susceptible to the influence of these man-

ufacturers in securing their influence in turn with their local legislators. Then, too, it is not beyond imagination that counsel for manufacturers might devise contract agreements which would defeat the purpose of such statutes. Only the courts, on the job all the time and alert to effectuate social justice, can stop the gaps."

The goal of safe cars or the unreasonableness of the design of the instant automobile cannot be left solely to legislative action. The Courts have a responsibility to protect consumers under existing laws and to interpret existing Indiana law.

CONCLUSION.

For the reasons above stated, this Court should grant Certiorari in this important product liability litigation.

Respectfully submitted,

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